As regards the second issue as to whether the defendants had waived the tender of the documents out of time, it is an issue of fact which cannot be resolved in these proceedings. It would involve a determination, inter alia, of the effect of the conduct of the defendants in (i) failing to reject the shipment promptly, (ii) applying to GTC to amend the BM L/C, (iii) requesting the plaintiffs to send the shipping documents to Habib Bank, and finally (iv) approving GTC's payment under the BM L/C for the said goods.

For the above reasons, the defendants' appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *Belinda Ang; S Bala & Associates.*

Reported by *Terence Tan Bian Chye*

Ho Mun-Tuke Don & Anor (Liquidators of City Securities Pte) v Oslo Finans AS

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 607 OF 1987
THEAN J
29 MARCH 1990

Companies and Corporations — Preference — Securities company in liquidation — Fraudulent and voidable preference — Whether transfer of client's money from trust account prior to liquidation was with a view to preferring over other creditors — Companies Act (Cap 50, 1985 Ed), s 329

Words and Phrases — 'View' — Bankruptcy Act (Cap 20, 1985 Ed), s 53(1)

CS Pte was a company of stockbrokers and dealers in securities. In June 1985, the defendant placed $1m with CS Pte for investment in the Singapore and Malaysian stock markets.

In February 1986, CS Pte was in financial difficulties and appointed a public accountant firm, PMM, to provide assistance in the management, administration and custody of scrips. PMM were authorized to open an 'escrow account' with TL Bank to receive proceeds from delivery of scrips, collection of receivables and disposal of CS Pte's assets.

On 31 March 1986, CS Pte entered into a 'standstill agreement' with 18 financial institutions which agreed to withhold enforcement of rights against CS Pte, principally for the purpose of preserving and protecting the assets of CS Pte for the benefit of the financial institutions. On 29 April 1986, CWT, a director of CS Pte, instructed one FC of the accountants PMM to open a trust account with a non-creditor bank BOC and to transfer into those accounts the amounts of $121,587.64 and $43,720 which belonged to the defendant and one RS, which were deposited with CS Pte in the TL Bank account. Subsequently, the defendant's moneys were again transferred on 14 May 1986 to SL Finance Ltd which bore interest for the deposits. From 26 May 1986 to 1 August 1986, CS Pte on instructions from the defendant purchased various shares in four lots from moneys in the SL Finance Ltd account.

On 3 July 1986, a winding-up petition was presented against CS Pte and on 4 July 1986, provisional liquidators were appointed. On 31 October 1986, a winding-up order was made against CS Pte and the plaintiffs were appointed liquidators. The shares were handed to the defendant partly by the plaintiffs and partly by CWT, but without the plaintiffs' knowledge that they were bought with the money from the SL Finance Ltd account. The balance sum of $69,310.19 remained in the SL Finance Ltd account. The plaintiffs claimed this balance amount and interest and the return of the shares from the defendant, but the latter point was not argued on appeal.

The plaintiffs argued that the sum of $121,587.64 transferred from the escrow account of CS Pte with TL Bank to the BOC trust account was made within three months prior to commencement of liquidation of CS Pte and was done so with a view to giving the defendant preference over the other creditors of CS Pte and was therefore void under s 53(1) of the Bankruptcy Act (Cap 20, 1985 Ed) applicable by virtue of s 329 of the Companies Act (Cap 50, 1985 Ed).

The defendant asked for an order that it was entitled to the balance standing in the SL Finance Ltd account and retention of the shares. The assistant registrar held in favour of the defendant in respect of both the moneys and the shares stating that the defendant was entitled to keep both. The plaintiffs appealed only in respect of the order for return of the moneys.

Held, dismissing the plaintiffs' appeal:

(1) The burden was on the plaintiffs to prove that the payment or transfer was made with a view to giving a preference to the defendant over the other creditors of CS Pte and the word 'view' was synonymous with 'intention' or 'object'.

(2) The main fact that at the material time the SL Finance Ltd account was set up and the transfer of money into it was effected per se could not give rise to an inference that the dominant intention of CS Pte was to give preference to the defendant over other creditors and such intention could not be inferred from the facts.

(3) There was no direct evidence both oral or documentary that the setting up of the trust account with BOC and transfer of funds to that account were effected with the dominant or principal intention on CS Pte's part to prefer the defendant over the other creditors.

Cases referred to

1 *Re Cutts (A Bankrupt), ex p Bognor Mutual Building* v *Trustee of TW Cutts* [1956] 1 WLR 728 (folld)
2 *Sharp (Official Receiver)* v *Jackson & Ors* [1899] AC 419 (folld)
3 *Sir William Henry Peat* v *Gresham Trust Ltd* [1934] AC 252 (folld)

Legislation referred to

Bankruptcy Act (Cap 20, 1985 Ed) s 53(1)
Companies Act (Cap 50, 1985 Ed) s 329
Securities Industry Act (No 17 of 1973) s 37

Rajah Chelva Retnam for the appellants/plaintiffs.
Chan Kok Chye for the respondent/defendant.

Cur Adv Vult

Thean J: The plaintiffs are the liquidators of an unlimited company, City Securities Pte (in liquidation), and took out this originating summons against the defendant and applied for determination of the following questions:

(1) Whether the moneys presently standing to the credit of City Securities Pte in fixed deposit with Shing Loong Finance Ltd Account No 28016180 is an asset of the defendant entitling the defendant to be paid such amount by the plaintiffs in priority over the other creditors of City Securities Pte.

(2) Whether the plaintiffs are entitled to the return of the 1,000 shares in Malayan Banking Bhd delivered by Mr Chiang Wee Tiong to the defendant on or about 24 November 1986 and the 4,000 shares in Singapore Airlines Ltd, 4,000 shares in Genting Bhd and 4,000 shares in Malayan Banking Bhd delivered by the plaintiffs to the defendant on or about 24 November 1986 or payment of damages by the defendant in lieu of such damages.

The application was heard before the assistant registrar, Mr Kenneth Au-Yong, and he decided the questions in favour of the defendant. Against that decision, this appeal is now brought.

Prior to its liquidation, City Securities Pte ('City Securities') was carrying on the business of stockbrokers and dealers in securities in Singapore. The defendant is a Norwegian company. On 4 June 1985, in response to a telex from the defendant, City Securities, through its director, Chiang Wee Tiong, made a proposal in writing to the defendant for placement by the latter of $1m 'for management by City Securities Pte into the Singapore and Malaysian stock market'. According to one Sven Norgaard, the general manager of International Securities Division or Department of the defendant, the arrangement contemplated by the parties involved the placement of $1m by the defendant with City Securities for investment in securities in the Singapore and Malaysian stock markets. Though this arrangement was not clearly spelled out in the proposal, that probably was what was intended by the parties. The proposal also contained terms or stipulations for custodian services to be provided by City Securities in respect of securities bought for account of the defendant. The proposal was accepted by the defendant by telex on 14 June 1985, and subsequently on 26 June the defendant instructed City Securities to establish a trust account in the name of the defendant for the safekeeping of the securities bought by City Securities on behalf of the defendant. Thenceforward, City Securities bought and sold for the defendant securities in the Singapore and Malaysian stock markets, and reports of such transactions were sent every month by City Securities to the defendant, and enclosed in each report was, among other things, a 'trust account statement'. In so far as City Securities was concerned, and probably unknown to the defendant, moneys placed by the defendant with City Securities for investment and proceeds of sales of the defendant's securities effected by City Securities were paid into one or more of the current accounts of City Securities, which were at all material times overdrawn; no separate trust account was set up for the defendant.

In February 1986 or thereabout, City Securities were in financial difficulties. On 27 February 1986 in order 'to allay the fears of several of its creditor financial institutions', City Securities appointed a public accountant firm, Peat, Marwick, Mitchell & Co ('Peats') 'to provide assistance in the management, administration and custody of scrips' in the office of City Securities. In that connection, Peats were authorized to open an 'escrow account' with Tat Lee Bank Ltd 'for the purpose of banking in all proceeds from delivery of scrips to the clients, collection of receivables and disposal of any other assets [of City securities], and Peats agreed to 'take steps to ensure that all such proceeds are banked into the account and that disbursements from the account [would] only be for bona fide transactions, subject to such guidelines as may be agreed by the banks and [Peats]'. For the purpose of operating the account, any one of the three partners of Peats, namely, Paul KW Ma, Peter MK Chee and Frances Cheang, was authorized to act jointly as a co-signatory with a director of City Securities for all cheques drawn on that account.

Subsequently on 31 March 1986, City Securities entered into what was called the 'standstill agreement' with 18 creditor financial institutions under which, among other things, the latter institutions were to hold their hands in the enforcement of their rights against City Securities for a certain period on terms as therein agreed. The standstill agreement was conditional on two further agreements, which were entered subsequently, namely: (i) an agreement between the financial institutions, City Securities and the directors and shareholders of City Securities ('the company agreement'), and (ii) the agreement between the financial institutions and Peats ('the Peats agreement'). It is unnecessary for my purpose to set out and deal with any of these agreements in any detail. Suffice it here to say they were entered into principally for the purpose of preserving and protecting the assets of City Securities for the benefit of the financial institutions and at the same time permitting City Securities to carry on its normal business while proposals for its restructuring were being worked out and considered.

On 29 April 1986, the director of City Securities, Chiang Wee Tiong ('Chiang'), had a discussion with Frances Cheang in connection with the setting up of a trust account for two clients of City Securities, namely, the defendant and one Robert Shock, who, according to Chiang, had credit balances of $121,587.64 and $43,720

respectively with City Securities. Following that conversation, Chiang wrote to Frances Cheang a letter dated 29 April 1986 which, so far as relevant, reads:

> I refer to our conversation this morning on the above mentioned matter.
>
> I would appreciate if you would kindly proceed with the setting up of the necessary trust account with a non-creditor bank.
>
> For your information, we have the following account with various balances as shown:
>
> | | | Amount with City Securities Pte |
> |---|---|---|
> | 1 | Oslo Finance AS | $ 121,587.64 |
> | 2 | Mr Robert Schock | $ 43,720.00 |
>
> As soon as this account is set up, I shall be grateful if the above mentioned amount be transferred.

Having ascertained from City Securities' accounting records that there were such balances, Peats thereupon opened a separate trust account with Bank of China in the name of City Securities and transferred from the escrow account with Tat Lee Bank Ltd to the trust account with Bank of China a sum of $158,985.02. It is necessary to set out in full the text of the letter from Peats to Bank of China for the opening of the trust account, which is as follows:

> FC/lk/Cor
>
> 30 April 1986
>
> Bank of China
> 4 Battery Road
> Singapore 0104
>
> Attn: Mr Lee Quay Thye
>
> We refer to our teleconversation of today with your Mr Lee Quay Thye, sub-manager of your business department. We enclose the relevant application form for the opening of a current account by City Securities Pte. This account is intended to be a trust account and moneys held in this account will be for the account of the clients of City Securities Pte in compliance with the Securities Industry Act. We enclose a cheque for $158,985.02 which is for the credit of this account.
>
> Kindly acknowledge receipt.
>
> Yours faithfully
> sgd Peat Marwick Mitchell & Co

As the account with Bank of China was not yielding any interest, the defendant's amount was transferred on 14 May 1986 to an interest bearing account also opened in the name of City Securities with Shing Loong Finance Ltd. Subsequently, City Securities, on instructions from the defendant, purchased for and on behalf of the defendant the following shares:

Date	Counter	No of Shares	Amount
26.5.86	SIA	4,000	24,622.40
26.6.86	Genting	4,000	18,612.80
26.6.86	Malayan Banking	4,000	15,034.80
1.8.86	Malayan Banking	1,000	3,879.30

Payments for all these shares were made out of moneys in this account with Shing Loong Finance Ltd ('Shing Loong account').

On 3 July 1986, a petition for the winding up of City Securities was presented, and on the following day, provisional liquidators were appointed. Finally, on 31 October 1986 a winding-up order was made against City Securities and the plaintiffs were appointed liquidators of the company. After their appointment, the plaintiffs handed over to the defendant the share certificates and transfers for the first three lots of shares described above. According to the plaintiffs, they did not at that time realize that the shares had been paid out of moneys in the Shing Loong account. The share certificate and transfer in respect of the fourth lot of shares, ie the 1,000 shares in Malayan Banking Bhd were handed over by Chiang to the defendant on 24 November 1986, which, according to the plaintiffs, was done without the latter's knowledge or consent. The balance standing to the credit of the Shing Loong account as at 31 August 1987 amounted to $69,310.19. The plaintiffs in this originating summons have claimed not only the amount of $69,310.19 and interest thereon, but also the shares, the certificates and transfers of which had been handed over to the defendant. Before me, however, counsel for the plaintiffs conceded that they are not claiming these shares, but only the credit balance of $69,310.19 and interest thereon.

The claim of the plaintiffs is that the transfer of the sum of $121,587.64 from the escrow account of City Securities with Tat Lee Bank Ltd to the trust account with Bank of China, which was made well within the period of three months prior to the commencement of the liquidation of City Securities, was made with a view to giving the defendant a preference over the other creditors of City Securities, and was therefore void under s 53(1) of the Bankruptcy Act (Cap 20, 1985 Ed) which is applicable by virtue of s 329 of the Companies Acts (Cap 50, 1985 Ed). Section 53 of the Bankruptcy Act provides:

> (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or any person in trust for any creditor, with a view to giving the creditor or any surety or guarantor for the debt due to the creditor a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within 3 months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the Official Assignee.
>
> (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

And s 329 of the Companies Act, insofar as relevant, provides:

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.

(2) For the purpose of this section, the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —

(a) in the case of a winding up by the Court —
(i) the date of the presentation of the petition; or
(ii) ...
(b) ...

(3) ...

The plaintiffs' claim is resisted by the defendant who has asked for an order that the credit balance in the Shing Loong account and interest thereon be paid to the defendant. The issue is one turning on the facts and the inferences to be drawn from them. The primary facts are not in dispute and have been substantially set out above. Chiang was not called — or could not be called as he was not, and is not, in Singapore — to give evidence as to why he had instructed Peats to make the transfer of $121,587.64 and open the trust account. The partner of Peats, who effected the transfer and opened the account with Bank of China, Frances Cheang, was called, and she gave evidence. Unfortunately, her evidence is unsatisfactory. In her letter of 30 April 1986 written to Bank of China, she said quite clearly that the account intended to be opened was a trust account for the clients of City Securities in compliance with the Securities Industry Act. Further, in a memorandum dated 31 December 1986 written by her to one of the plaintiffs, she said, among other things, the following:

> We are notified on 2 April 1986 by Mr Chiang Wee Tiong, a director of City Securities Pte ('City'), that the following clients have credit balances with City:
>
> | | | Balances as at 29 April 1986 |
> |---|---|---|
> | (i) | Oslo Finans AS | 121,587.64 |
> | (ii) | Mr Robert Schock | 43,720.00 |
>
> We were informed by Mr Chiang that the above clients have given him the discretion to invest the fund in local securities on their behalf. We were requested to open a separate trust account with a non-creditor bank in order that any transactions entered into on their behalf can be clearly identifiable. The setting up of the trust account would also ensure compliance with Section 37 of the Securities Industry Act 1973 then in force.

Yet in her evidence in examination-in-chief she said that the opening of the trust account was not really in compliance with the Securities Industry Act (No 17 of 1973) and that that Act provided her merely a reason for opening a trust account, otherwise the bank, ie Bank of China, would be reluctant to open a trust account. I find her answer or explanation extremely puzzling. First, I do not understand why Bank of China, or any bank for that matter, would, in the circumstances, refuse to open a trust account, if it was explained to them, as indeed it was, that the moneys were clients' moneys held on trust. I found that her explanation for quoting the provision of the Securities Industry Act in opening the trust account unconvincing. Secondly, in her memorandum to the plaintiffs she said nothing of the kind which she said in examination-in-chief. Later, however, in the cross-examination, she said the following:

> Ms Cheang: It was client's moneys held and Mr Chiang wished to establish trust account — since in accordance with regulation governing the nature of their business, I concluded that it was the correct action to take.
>
> ...
>
> Ms Cheang: I could not set up trust account in Bank of China — ie unless there was compliance with Securities Industry Act upon instruction from Mr Chiang.

What she said here is certainly more consistent with what she wrote to Bank of China and to the plaintiffs. These then are all the facts before me, as were before the assistant registrar.

I next turn to the law. It is settled law that the burden is on the plaintiffs to prove that the payment or transfer was made with a view to giving a preference to the defendant over the other creditors of City Securities. In the case of *Re Cutts (A Bankrupt), ex p Bognor Mutual Building Society* v *Trustee of TW Cutts*,[1] a payment to a building society made by a solicitor, who was subsequently adjudicated a bankrupt, was held by the county court to be a fraudulent preference. That finding was upheld on appeal by the divisional court and subsequently by the Court of Appeal. Lord Evershed MR in his judgment said, at pp 733 to 734:

> (1) The onus is upon the person alleging 'fraudulent preference' to prove to the satisfaction of the court that the payment impugned was made by the debtor 'with a view of preferring the payee over his other creditors; in other words, the onus is upon the person alleging a fraudulent preference (normally, as here, the trustee in bankruptcy) to prove the fact of the debtor's requisite state of mind, that is, his intention.
>
> (2) It is competent for the court to draw the inference of intention to prefer from all the facts of the case, particularly when there is no direct evidence of intention before it. But the inference should not be drawn, having regard to the situation of the onus of proof, unless such inference is the true and proper inference from the facts proved. Thus, it will not be drawn, if the inference from the facts is equivocal and, in particular, it will not be drawn from the mere circumstances that the creditor paid was 'in fact' preferred, in the sense that he was paid when other creditors were not paid and could not be paid.
>
> ...
>
> (3) The words used in the section are 'with a view of'. I have used the word 'intention' as synonymous with the word

'view'; and other words — eg 'object' — have also been used as synonyms in the cases. But whether the word used be 'intention' or some other word, since it is notorious that human beings are by no means always single-minded, the intention to prefer, which must be proved, is the principal or dominant intention. There may also be a valid distinction for present purposes between an intention to prefer and the reason for forming and executing that intention.

From the judgment of Lord Evershed it is clear that, first, the onus is upon the person who seeks to avoid the payment to prove that the payment was made with a view to preferring the recipient over the other creditors; secondly, the word 'view' was construed as synonymous with 'intention' or 'object'; thirdly, where there is no direct evidence, it is open to the court to infer such intention from the facts, but such inference should only be drawn if it is the true and proper inference, and it will not be drawn from the mere fact that the creditor was paid when others were not, and, lastly, the intention to prefer must be the dominant or principal intention.

Turning to the facts before me, clearly there was no direct evidence that the setting up of the trust account with Bank of China and transfer of funds to that account were effected with the dominant or principal intention on the part of City Securities to prefer the defendant over the other creditors. It is essentially a question as to what inferences I can and should draw from the facts. As was laid down in *Re Cutts*,[1] the mere fact that at the material time the account was set up and the transfer was effected per se cannot give rise to an inference that the dominant intention of City Securities was to give a preference to the defendant over the other creditors. This was illustrated clearly in an earlier case: *Sharp (Official Receiver)* v *Jackson & Ors*.[2] There, a trustee, who had committed breaches of trust, on the eve of his bankruptcy executed a deed conveying certain property of his to rectify the breaches. It was held that such conveyance was not a fraudulent preference, the debtor's intention being to shield himself from the consequences of his breach of trust. On appeal, the decision was affirmed by the Court of Appeal and on further appeal was also affirmed by the House of Lords. Earl of Halsbury LC in his speech, at pp 421-422, approved the following passage of the judgment of Lord Esher MR in the Court of Appeal:

> The question whether there has been a fraudulent preference depends, not upon the mere fact that there had been a preference, but also on the state of mind of the person who made it. It must be shewn not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that is true for this purpose. I think one must find out what he really did intend. The recitals in the deed seem to me to shew what was really his object. It appears to me obvious that he was not actuated by any feeling of bounty towards those in whose favour the deed was made, but was doing what he did for his own benefit. He wanted to render those particular persons disinclined to proceed to extremities against him. He knew that what he had done must be discovered very shortly, and those persons had a hold upon him, because, if they chose to proceed against him, the consequences to him might be very serious. He thought that if he put them as far as he could into the same position as if he had not committed the breaches of trust, that might go in mitigation of the consequences to himself. It seems to me clear, therefore, that he made this conveyance not with the 'intention' or 'view' or 'object' or whatever it may be called of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances, what he did is not a fraudulent preference within the Bankruptcy Act.

It was argued by counsel for the plaintiffs that the transfer of $121,587.64 from the account in Tat Lee Bank Ltd to the trust account with Bank of China was in breach of the standstill agreement, company agreement and also the Peats agreement, and that Peats in opening the Bank of China account and transferring the funds to that account acted outside the scope of their obligations under the Peats agreement. He also relied on the fact that there was an absence of demand by the defendant. In the circumstances, he contended that the proper inference to be drawn from these facts is that there was an intention and a dominant intention by the City Securities to give preference to the defendant over the other creditors. I am unable to accept such an argument. The facts before me do not give rise unequivocally to such an inference. There are other inferences that can be drawn. In particular, from the evidence of Frances Cheang and the facts relating to the setting up of the trust account and transfer of funds, the inference could well be that Chiang instructed the account to be set up and transfer of funds to be effected in order to rectify a breach of the company's fiduciary duty to the defendant in respect of the latter's funds held by it or a breach of the provision of s 37 of the Securities Industry Act. This appears to me to be a far stronger inference than that contended by counsel for the plaintiffs and is also consistent with the evidence of Frances Cheang given in cross-examination. In the case of *Sir William Henry Peat* v *Gresham Trust Ltd*,[3] a debtor company created a charge in favour of its creditor, which was not registered within the time prescribed by the then Companies Act. Subsequently, the creditor applied for an extension of time for effecting such registration. The application was initially opposed by the company but the opposition was withdrawn, and the order was made and the charge was registered. Shortly thereafter, a compulsory winding-up order was made and the liquidator took out a summons seeking to avoid the withdrawal of the opposition by the company to the application by the creditor for the extension of time. It was held that the onus was on the liquidator to prove that the dominant intention for the withdrawal of the opposition was to prefer the creditor over the others and there being no

direct evidence such intention could not be inferred. Lord Tomlin in his speech said at p 262:

> It is contended on the appellant's behalf that once given the withdrawal and the consequences of the withdrawal, then in the absence of any other explanation the intent to prefer must be inferred, because a man is presumed to intend the natural consequences of his act. My Lords, I do not accept this contention. In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present.

Similarly, in this case, there was no direct evidence that the transfer of the funds to the trust account was made with the dominant intention on the part of City Securities to give preference to the defendant over the other creditors, and such intention cannot be inferred from the facts. The plaintiffs have therefore failed to discharge the burden of proof. In the result I agree with the conclusion reached by the learned assistant registrar, and I dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Tan Rajah & Cheah; Chu Chan Gan & Ooi.*

Reported by *Seah Min Wai*

Development Bank of Singapore Ltd v Eng Keong Realty Pte Ltd & Anor

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 1077 OF 1988
YONG PUNG HOW J
19 MARCH 1990

Civil Procedure — Interpleader summons — Money deposited with bank to procure issue of a guarantee — Whether purchaser entitled to payment under guarantee — Rules of the Supreme Court 1970, O 17 rr 1 & 3

Contract — Guarantee — Vendor in sale and purchase agreement — Compensation to purchaser for fees incurred in alienation of state reserve — Whether licence from state fulfils terms of guarantee

Land Law — Alienation of state reserve for extension of road — Whether alienation includes grant of licence from state — Land Titles Act (Cap 157, 1985 Ed), s 8

Words and Phrases — 'Alienation' — State Lands Act (Cap 314, 1985 Ed) — Land Titles Act (Cap 157, 1985 Ed), s 8

By a written agreement, the second defendants agreed to sell land to the first defendants with planning approval given for the construction of houses subject to a condition requiring construction of a road extension. Clause 10 of the agreement provided that the first defendants need not bear the costs of procuring alienation of state reserve for the road extension and that the second defendants were to provide a bank guarantee for the sum of $170,000 in the event that the first defendants were required to pay for the said alienation. Pursuant to cl 10, a bank guarantee was issued by the plaintiffs upon the second defendants placing a deposit with them. The guarantee was effective from 15 October 1987 to 14 April 1988.

Subsequently, on 12 April 1988 the first defendants' solicitors wrote to the plaintiffs informing them that the Commissioner of Lands was levying a consideration fee for alienation of the state reserve. A letter from the Commissioner dated 11 April 1988 stated that a consideration fee was payable for the 'issue of a licence to enter and construct an access road on the state reserve'.

On 27 April 1988, the second defendants' solicitors wrote to the plaintiffs putting them on notice not to make any payment under the guarantee, stating that the first defendants' solicitors' letter on 12 April 1988 did not constitute a claim under the guarantee.

The bank as plaintiffs applied for relief by way of interpleader for an order for the payment of the $170,000 to the rightful party.

Held, giving judgment for the second defendants:

(1) Under cl 10 of the agreement, the first defendants could only have obtained payment under the guarantee for moneys that they had paid or had been called upon to pay in respect of the alienation of any state reserve.

(2) Alienation is necessarily limited to the transfer of ownership of property and 'implies a transaction by which property is given to another'.

(3) The term 'alienation' in Singapore could not have meant anything other than an alienation by the state because all land ultimately belongs to the state.

(4) The first defendants, for some reason which was not known, only applied for a licence to enter upon the state reserve which, even if that created an easement, would confer on the first defendants no proprietary or possessory right in the state reserve affected.

(5) The granting of the licence did not constitute an alienation within the meaning of the term in the guarantee and therefore no demand could be made under the guarantee.

(6) Since no valid demand had been made under the guarantee before the expiry date on 14 April 1988, the first defendants were no longer entitled to rely on it and the second defendants were entitled to the $170,000 with interest thereon.

[*Editorial Note*: The first defendants have appealed to the Court of Appeal vide Civil Appeal No 12 of 1990 and Civil Appeal No 49 of 1990.]

Cases referred to

1 *McDonald* v *Peddle* [1923] NZLR 987 (refd)
2 *Re Salvin's Indenture; Pitt* v *Durham County Water Board* [1938] 2 All ER 498 (refd)
3 *National House-Building Council* v *Fraser & Anor* [1983] 1 All ER 1090 (refd)
4 *Bunbury Foods Pte Ltd & Anor* v *National Bank of Australasia Ltd & Anor* (1984) 58 ALJR 199 (refd)
5 *O'Day* v *Commercial Bank of Australia* (1933) 50 CLR 200 (refd)
6 *Re Gaskell and Walters' Contract* [1906] 2 Ch 1 (follid)
7 *Dow Banking Corp* v *Mahnakh Spinning & Weaving Corp* [1983] 2 Lloyd's Rep 561 (refd)